UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED MECHANICAL SERVICES, INC.

and

Case 7—CA—41687

PLUMBERS AND PIPE FITTERS LOCAL 357, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

and

Case 7—CA—41783

LOCAL 7, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO

and

Case 7—CA—41993

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

ORDER DENYING MOTION FOR RECONSIDERATION

On October 25, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding finding that the Respondent violated Section 8(a)(1) of the Act by filing and maintaining a lawsuit against four unions, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and its Plumbers and Pipe Fitters Local 357, and Sheet Metal Workers International Association, AFL-CIO, and its Local 7, concerning Local

7's refusal to grant to the Respondent job targeting funds.¹ The Board found that the Respondent's lawsuit lacked a reasonable basis in fact or law and was filed with a retaliatory motive. To remedy the unfair labor practice, the Board ordered the Respondent to cease and desist and to take certain affirmative action, including to reimburse the Unions for all legal and other expenses incurred in defense of the Respondent's lawsuit, with interest compounded on a daily basis in the manner prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds 647 F.3d 1137 (D.C. Cir. 2011), and to post a Notice to Employees for 60 days in conspicuous places, and to distribute the notice electronically if the Respondent customarily communicates with its employees by such means, in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On November 21, 2011, the Respondent filed a Motion for Reconsideration. The Acting General Counsel and the Charging Party Unions filed responses in opposition to the motion.

Having duly considered the matter, we find that the Respondent's motion fails to present "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.

First, the Respondent contends that the Board committed material error by ordering the Respondent to reimburse the Unions' litigation expenses with interest compounded on a daily basis instead of simple interest. Specifically, the Respondent argues that the new policy announced in *Kentucky River*, supra, of compounding interest

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¹ 357 NLRB No. 101. The Board issued a correction on October 27, 2011, appending to its decision an inadvertently omitted supplemental decision of the administrative law judge.

on a daily basis applies only to backpay awards. The Respondent further contends that the Board's retroactive application of the new policy in this case would work a "manifest injustice." We disagree. The Board's award of daily compounded interest in this case fully comports with extant Board law. Contrary to the Respondent's assertions, the Board in Kentucky River did not limit its holding to backpay awards. Indeed, the Board has applied the daily, compound interest requirement announced in *Kentucky River* to monetary awards other than backpay, including the reimbursement of attorney's fees or other expenditures in connection with a legal action that the Board has found to violate the Act. See Sheet Metal Workers International Association, Local 27, AFL-CIO (E.P. Donnelly, Inc.), 357 NLRB No. 131, slip op. at 1, fn. 1 (2011) (ordering daily compound interest on reimbursement of payments made by employer to union pursuant to the union's enforcement of an arbitration award that conflicted with a Board Section 10(k) determination and therefore could not lawfully be enforced); New York, New York Hotel and Casino, 356 NLRB No. 119, slip op. at 2, fn. 8 (2011) (ordering daily compound interest on award of legal fees or other expenses incurred by employees while defending themselves against trespass citations). Furthermore, the Board in *Kentucky River* expressly rejected the notion that it would be manifestly unjust to apply the new remedial policy retroactively, emphasizing that "[w]e are deciding a remedial issue, not adopting a new standard concerning whether certain conduct is unlawful." 356 NLRB No. 8, slip op. at 5. The Respondent has not shown that retroactive application of the new policy in the instant case will cause any particular injustice.²

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² Cf. *New York*, *New York*, supra (ordering daily, compounded interest awarded in a case that had been pending before the Board for more than 13 years).

Contrary to the Respondent's contention, we are not persuaded that the Respondent was entitled to rely on preexisting law in deciding to contest this case

Second, the Respondent claims that the Board committed material error by requiring that the Notice to Employees be posted electronically. The Respondent contends that electronic posting is an "extraordinary remedy" that should be reserved for cases involving egregious unfair labor practices or recidivist violators of the Act. In *J. Picini*, in response to the arguments of the dissent and amicus curie that electronic posting is an "extraordinary remedy," the Board explained:

[O]nly respondents that customarily communicate with employees or members by electronic means will be required to post remedial notices electronically. Accordingly, our decision does not impose extraordinary or onerous burdens on respondents. Indeed, respondents who customarily communicate with employees or members electronically have chosen to do so because it is the most efficient and cost effective way to disseminate important information.

356 NLRB No. 9, slip op. at 4. The posting provision in this case specifically states that the Respondent shall distribute the Notice to Employees electronically "if the Respondent customarily communicates with its employees by such means." 357 NLRB No. 101, slip op. at 13. Moreover, to the extent the Respondent is contending that electronic posting is inappropriate in the particular circumstances of this case, that argument is premature. As the Board made clear in *J. Picini*, "[a]ny issues as to whether electronic notice and which

because the General Counsel did not announce in the complaint that he was seeking daily compound interest as a remedy. Cf. *Kentucky River*, 356 NLRB No. 8, slip op. at 5 (the complaint put the respondent on notice that compound interest was sought). We observe that since 1989, the General Counsel has actively sought the adoption of a policy of ordering compound interest on all monetary awards. See General Counsel Memorandum 00-05, Compounding of Interest on Backpay and Other Monetary Awards, 2000 WL 33958147 (July 20, 2000). See also General Counsel Memorandum 07-07, Seeking Compound Interest on Board Monetary Remedies, 2007 WL 1308381 (May 2, 2007); *Alaska Pulp Corp.*, 300 NLRB 232, 232 fn. 4 (1990), enfd. 944 F.2d 909 (9th Cir. 1991) (stating that the Board was taking under advisement the General Counsel's request that "the Board change from a simple interest to a daily compounding method of computing

interest on backpay and other monetary awards." (emphasis added)).

type of electronic notice is appropriate in a particular case should be resolved in compliance proceedings." 356 NLRB No. 9, slip op. at 2.

Finally, the Respondent contends that the Board failed to correctly apply the standards enunciated by the Supreme Court in *BE&K Construction v. NLRB*, 536 U.S. 516 (2002), and erroneously concluded that its lawsuit was baseless and retaliatory in derogation of those standards. Specifically, the Respondent contends that the Board improperly disregarded the Court's holding in *BE&K* that it can no longer rely on a trial court's dismissal of a lawsuit to conclude that the lawsuit was without merit. The Respondent further contends that in finding retaliatory motive, the Board relied on several factors that were expressly foreclosed by the Court in *BE&K*, including the fact that the lawsuit related to protected conduct, the presence of antiunion animus, and the lawsuit's obvious lack of merit.

In arguing that the Board erroneously relied on the dismissal of its lawsuit to find that the lawsuit was baseless, the Respondent misconstrues the Board's decision. While the Board found that the district court's dismissal of the Respondent's lawsuit and the court of appeals' affirmance of that dismissal "militates in favor of" a finding that the lawsuit lacked a reasonable basis, the Board did not rest its finding of baselessness on the dismissal of the lawsuit alone. 357 NLRB No. 101, slip. op. at 7. Rather, the Board independently analyzed each count of the Respondent's lawsuit and explained in great detail the rationale for its finding that the suit lacked a reasonable basis in either fact or law. Id., slip op. at 7 - 10.

As indicated above, the Board also found that the Respondent's lawsuit was filed with a retaliatory motive. The Board based that finding on the Respondent's antiunion animus, demonstrated by its history of unfair labor practices and its vice president's

statement that he intended to "get even" with the unions; the fact that the lawsuit sought damages for the unions' statutorily protected conduct; and the lawsuit's obvious lack of merit. In its retaliatory motive analysis, the Board specifically considered and rejected the argument, advanced by the dissent in that case and renewed by the Respondent here, that the Court in *BE&K* barred reliance on these factors. Id., slip op. at 11 - 12 (observing that the limited question before the Court in *BE&K* was whether the Board could hold that a *nonbaseless*, but unsuccessful lawsuit violated the Act; the Court did not rule on the question of what evidence would suffice to prove retaliatory motive when an action is baseless). The Respondent fails to advance any compelling reason why those determinations should be reconsidered. The Respondent's motion merely expresses its disagreement with the majority's findings, which clearly is not a ground for reconsideration.³

IT IS ORDERED, therefore, that the motion for reconsideration is denied.

Dated, Washington, D.C., December 29, 2011.

Mark Gaston Pearce	, Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

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³ Member Hayes concurs in the result. Although he adheres to the views expressed in his dissent in the underlying case, he agrees that the Respondent has not established grounds warranting reconsideration of the Board's decision under the standard set by Sec. 102.48(d)(1) of the Board's Rules and Regulations.